

TITLE XIII

RULES GOVERNING THE TAX CREDIT PROGRAM FOR THE CREATION AND RESTORATION OF PRIVATE WETLAND AND RIPARIAN ZONES

[As Adopted February, 1996]

SUBTITLE I. GENERAL

Section 1301.1. PURPOSE.

Wetlands and riparian zones provide the State with significant benefits in the areas of flood control, water quality enhancement, fish and wildlife habitat, recreation, and recharging of groundwater. The State continues to experience significant loss of wetlands. Since the majority of lands suitable for wetlands and riparian zones are held by private owners, the State has developed this program to encourage these owners to restore and enhance existing wetlands and riparian zones, and when possible to create new wetlands and riparian zones.

Section 1301.2. LEGISLATION.

Arkansas Code Annotated §26-51-1501 *et seq.* (Act 561 of 1995), the "Arkansas Private Wetland and Riparian Zone Creation and Restoration Incentive Act of 1995", allows a credit against the tax imposed by the Arkansas Income Tax Act (Arkansas Code Annotated §26-51-101 *et seq.*) for any taxpayer engaged in the development or restoration of wetlands and riparian zones.

Section 1301.3 DEFINITIONS.

As used herein, unless the context otherwise requires:

A. "Act" means the Arkansas Private Wetland and Riparian Zone Creation and Restoration Incentives Act of 1995 (A.C.A. §26-51-1501 *et seq.*).

B. "Application" means a written plan for development and operation of the Project, including all requirements as the Commission may adopt by rule.

C. "Commission" means the Arkansas Soil and Water Conservation Commission.

D. "Committee" means the Private Lands Restoration Committee.

E. "Department" means the Revenue Division of the Arkansas Department of Finance and Administration ("DF&A").

F. "Developing wetlands" means to establish a wetland or other aquatic resource.

G. "Enhancing wetlands" means any activity that improves wetlands.

H. "Executive Director" means the Executive Director of the Arkansas Soil and Water Conservation Commission.

I. "Project" means wetlands or riparian zones created or restored by activities for which tax credits are claimed.

J. "Project cost" means the actual expenditure for a project less any reimbursement received by the taxpayer from cost-share programs or any other funding.

K. "Restoring wetlands" means to return wetland values and functions to a former wetland or degraded wetland where human or natural activities have diminished or destroyed such values and functions thereby returning the land to wetland status.

L. "Riparian zone" means an area of land along the bank of a natural water course or contiguous to a body of water that is set aside to reduce impacts of adjoining land use on the stream or water body or any other definition promulgated by the Commission.

M. "Tax credits" means the authorized amount that may be applied against Arkansas corporate income tax or Arkansas individual income tax, whether earned by an individual, partnership, limited liability company, S Corporation or Corporation. The amount of credit is equal to qualified project cost for the development or restoration of wetlands and riparian zones.

N. "Taxpayer" means the entity that is certified to earn tax credits for an approved project, whether an individual, partnership, limited liability company, S Corporation or Corporation.

O. "Wetlands" means an area that has water at or near the surface of the ground at some time during the growing season (wetland hydrology). It contains plants that are adapted to wet habitats (hydrophytic vegetation) and is made up of soil that has developed under wet conditions (hydric soils) or any other definition promulgated by the Commission.

Section 1301.4. DELEGATION OF AUTHORITY.

The Executive Director is delegated all powers necessary and convenient to carry out the responsibilities contained in these rules.

Section 1301.5. APPEALS.

A. Except as otherwise provided herein, a taxpayer may appeal, pursuant to Title I, Subtitle V of the Commission's Rules, any decision or action of the Executive Director.

B. All decisions related to recapture of tax credits shall be appealed in accordance with the Department's established procedures. contained in A.C.A. §26-18-101 et seq.

SUBTITLE II. PRIVATE LANDS RESTORATION COMMITTEE.

Section 1302.1. MEMBERSHIP.

A. This Committee shall be made up of the directors, or their designees, of the Arkansas Forestry Commission, Arkansas Game and Fish Commission, Arkansas Department of Finance and Administration, Department of Arkansas Heritage, and the Arkansas

Department of Pollution Control and Ecology, and two (2) public members appointed by the Commission.

B. Selection of public members shall be made on the basis of their knowledge of wetlands with consideration given to the wide variety of interest in wetlands.

C. Term Limits - The public members of the Committee shall be appointed for five-year terms. Individuals appointed are eligible for reappointment at the expiration of this term.

D. Replacement of Public Members - Any vacancies arising in the appointed public membership of this Committee shall be filled by the Commission. The Committee shall submit its recommendations for appointees within thirty (30) days of the vacancy.

E. Officers - The Committee shall elect a chairman and a vice-chairman annually from among its members. Any member may be elected to succeed himself in office. The Executive Director shall appoint an ex-officio secretary to provide administrative assistance to the Committee.

Section 1302.2. PROCEDURES.

A. Meetings - 1. Regular meetings - It shall be the duty of the Committee to meet regularly, when necessary, on a quarterly basis, for the purpose of conducting the business of the Committee.

2. Special meetings - Special meetings of the Committee may be called at any time at the discretion of the chairman or the secretary. Special meetings may also be called upon the request of any two members of the Committee.

B. Quorum/Decisions - Four (4) members shall constitute a quorum at any meeting of the Committee. A quorum shall be required for any action on issues before the Committee. Any action which is not reached by a consensus shall be presented to the Executive Director with the multiple recommendations to be considered.

C. Records - The Secretary shall maintain the official records of the Committee, including accurate minutes of each Committee meeting, a log of all applications received, a summary of discussions upon which Committee decisions are based and a copy of recommendations of the Committee to the Commission.

D. Notice of Meetings - Written notice of all regular meetings shall be provided to Committee members by the Secretary. Written notice of special meetings should be given but notice may be given by the secretary through telephone contact when necessary.

SUBTITLE III. ADMINISTRATION OF THE PROGRAM.

Section 1303.1. THE COMMISSION:

A. Rules. The Commission is charged with the responsibility of promulgating and administering rules related to

the creation and restoration of wetlands and riparian zones with the intent of qualifying for the tax incentives provided under the Act.

1. These rules and regulations shall be developed according to the Arkansas Administrative Procedures Act, A.C.A. § 25-15-201 *et seq.*

2. Prior to adoption of any rules under the Act, the Commission shall obtain comments on the proposed rules from the Committee.

B. Fees. The Commission may charge a reasonable application fee for the processing of tax credit applications.

1. Applicant shall pay to the Commission a fee in an amount equal to three percent (3%) of the total tax credit approved by the Commission. The minimum fee shall be one hundred dollars (\$100.00).

2. All fees shall be paid to the Commission when an application for tax credit approval is filed. Should payment be based on an estimate of cost which is less than actual final total cost of the project, the balance will be due and payable when a request for a Certificate of Completion for Tax Credit is filed. No completion certificate shall be issued until the balance due has been paid. If the applicant's estimate exceeded the actual cost of the project, the Commission will refund the fee overcharge when the completion certificate is issued. When a project is rejected by the Executive Director, the full application fee will be refunded.

3. In the case of a project involving multiple landowners, the fee shall be paid according to the percentage of tax credit each participating party receives.

4. All fees collected shall be deposited in the Water Development Fund.

C. Reports. The Executive Director shall provide reports quarterly to the Department of the total number of projects approved and the total number of projects receiving final certification.

Section 1303.2. THE PRIVATE LANDS RESTORATION COMMITTEE.

The Committee shall:

- A. Offer comments to the Commission on proposed rules governing tax incentives relating to creation and restoration of wetlands and riparian zones.

- B. Provide recommendations to the Executive Director for approval or disapproval of each application for tax credit.

- C. Participate in site visits and compliance inspections as deemed necessary for the evaluation and certification of projects.

- D. Provide information as required by the Executive Director for its report to the Department.

- E. Provide assistance in the furtherance of the program.

SUBTITLE IV. PROCEDURES

Section 1304.1. TAXPAYER APPLICATION FOR TAX CREDIT.

A. Must submit a written application on a form provided by the Executive Director.

B. The application form shall require the following information:

1. Identify taxpayer by name and type of ownership (individual, corporation, partnership, Sub S, etc.).
2. List of officers, Subchapter S shareholders with percentage of ownership, partners with percentage of ownership, etc.
3. Federal Employee Identification Number and/or Social Security Numbers for business of individuals to claim credit.
4. Address; telephone and facsimile numbers of all participating taxpayers.
5. Contact person's name, address, telephone and facsimile numbers.
6. Estimated Project Cost including a breakdown of costs by activity.
7. List all funding sources include all those applied for even if approval is still pending; amount of contribution anticipated from each.
8. Location of project - include maps and description of site location (e.g., county, section, township, range, latitude, longitude, watershed, etc.).
9. Current and historical ownership information, including whether adjacent land is owned by taxpayer.
10. Description of current and historical land use of project site and of adjacent properties.
11. Name of water body(ies) affected by the proposed restoration project, if applicable.
12. Site characterization information in sufficient detail necessary to describe the proposed project. Include the following if applicable to the project:
 - (a) soil type,
 - (b) existing vegetation ,
 - (c) information describing the condition of site (e.g., site highly eroded or scoured, banks sloughing, heavily grazed or trampled vegetation, compacted soils, riprapped banks, etc.),
 - (d) topography,
 - (e) flood plain boundaries if available, and
 - (f) pictures of the site, including aerial photographs if available.

13. Detailed description of project in sufficient detail as necessary. Include the following if applicable to the project:

- (a) project goals and objectives for restoration project, identify the problems being addressed and the solutions to be implemented,
- (b) success criteria (i.e., measures of success),
- (c) target vegetative community to be established,
- (d) target site hydrology to be established (if applicable),
- (e) planting plan showing location, spacing, and planting arrangements of plant species,
- (f) proposed construction activities,
- (g) construction drawings,
- (h) proposed post construction activities,
- (i) proposed project construction schedule,
- (j) proposed monitoring plan, and
- (k) name, address, telephone and facsimile numbers and qualifications of individuals or companies providing professional services or assistance in the development of the plan on company letterhead.

14. Additional relevant information may be requested by the Committee and/or the Executive Director as deemed necessary for a complete review of the proposed project.

Section 1304.2. APPLICATION REVIEW - COMMITTEE.

A. The Committee shall evaluate the application for compliance with the Act and requirements of Title XIII of the Commission's regulations. The Executive Director and the Committee shall give priority to projects involving extraordinary resource streams and/or projects which enhance potential habitat for threatened or endangered species.

B. The Committee shall provide the Executive Director with written comments and recommendations on applications when the evaluation process is completed.

Section 1304.3. PROCESSED BY COMMISSION - EXECUTIVE DIRECTOR.

A. Make the application available to the Committee for its review and comments.

B. After reviewing the application and the Committee comments, the Executive Director, if he determines that the project complies with the Act and this title of the Commission's regulations, may issue a Tax Credit Approval Certificate to taxpayers whose projects meet the requirements based on estimated project costs.

C. After a satisfactory final inspection of the project the Executive Director shall issue a Certificate of Completion based on the taxpayer's reported costs of the project.

Section 1304.4. CREDITS.

A. Tax credit provided under the Act may be applied to taxable years beginning on or after January 1, 1996, and all taxable years thereafter.

B. Taxpayers claiming a tax credit under this Act may not claim a credit under the Water Resources Conservation and Development Incentives Act of 1985 or any similar act for any costs related to the same project.

C. Any portion of a project that is a mitigation activity required under state or federal law shall not be eligible for tax credit under this Act.

D. Any tax credits issued to partnerships, limited liability companies, Subchapter S corporations or fiduciaries may pass through to their members, managers, partners, shareholders and/or beneficiaries. Tax credits are not transferable to other individuals or entities.

E. Amount of Credit Assigned. The amount of credit allowed under the Act shall be equal to the project cost incurred by the taxpayer in the development or restoration of wetlands and riparian zones. Only the actual costs to the taxpayer will be considered for tax credit.

F. Expiration of tax credit availability. The tax credits established by the Act shall expire on December 31 of the calendar year following the calendar year in which the tax credits used pursuant to the provisions of the Act exceed five hundred thousand dollars (\$500,000.00). Any taxpayer having been issued a certificate of tax credit approval on or prior to this day may complete the project and shall be entitled to the tax credits provided under the Act without regard to expiration of tax credit availability.

G. Use of Assigned Credit.

1. The taxpayer shall file the certificate of tax credit approval with the income tax return for the first year in which the taxpayer claims a tax credit under this Act.

2. The taxpayer must file the certificate of completion with the first tax return filed after issuance of the certificate of completion.

3. If the taxpayer completes the project, and receives a Certificate of Completion in the same year the Certificate of Approval is issued both documents must be filed with the tax return when tax credit is claimed.

4. The amount of credit that may be used by a taxpayer for a taxable year may not exceed the lesser of the amount of individual or corporate income tax otherwise due or five thousand dollars (\$5,000.00) per taxpayer.

5. Any unused credit may be carried over for a maximum of nine (9) consecutive taxable years following the taxable year in which the credit originated.

6. Project costs incurred after issuance of a tax credit approval certificate may be claimed for tax credit, subject to limitations stated herein. Actual

project costs will be compared to the projections which appeared on the application and any necessary adjustments will be made when the Executive Director prepares the Certificate of Completion.

SUBTITLE V. PROJECT DEVELOPMENT AND OPERATION.

Section 1305.1. GENERAL REQUIREMENTS.

A. Time. All projects must be completed and properly functioning within three (3) years of the date of the certificate of tax credit approval AND the project must be maintained for a minimum life of ten (10) years after certified as being complete.

B. Records. The taxpayer shall maintain records related to this tax credit for the minimum life of the project plus three years.

C. Reports. The taxpayer shall provide written notice to the Executive Director when the project is completed and available for final inspection. The taxpayer shall also notify the Executive Director when complications develop which may cause the project to fail to function as designed and such notice shall include anticipated steps to be taken to ensure project goals and objectives are met.

D. Notice. The taxpayer shall notify the Executive Director when the project is completed and functioning. At that time the taxpayer will provide a report on the actual cost of the project if that figure varies from the amount quoted in the application.

E. Inspections. At least one member or designee of the Committee shall accompany a member of the Commission staff on a site inspection prior to issuance of the Certificate of Completion. After that time, monitoring of project maintenance shall be done by a member of the Commission staff and/or a member or designee of the Committee in periodic random inspections.

F. Maintenance. The taxpayer is responsible for insuring project maintenance for the full term of obligation.

Section 1305.2. CRITERIA FOR PROJECTS.

A. The costs of the following activities are eligible activities for tax credit:

1. General - Professional services required in the characterization of the site, in the preparation of the plan or project design and in the implementation of the plan, and professional monitoring required for maintenance of the project.

2. Riparian Zones - Activities that are considered creation, restoration or improvement, including:

- (a) The site preparation necessary to establish permanent vegetation.

- (b) Establishment of permanent vegetation cover such as approved grasses and trees.

(c) Water facilities to benefit livestock which will protect wetland and riparian zones.

(d) Construction of partial or full enclosures (e.g., fencing, vegetative screens or borders, placement of timbers or railroad ties) along stream banks, shorelines, and slopes to deter grazing, trampling of vegetation, and soil compaction.

(e) Bank or shoreline stabilization and erosion control including mulching, geotextile fibers (e.g., geoweb, geogrids, etc.), structural materials (e.g., timbers, stone), riprap, tree revetments, gabions, or other approved practices when used to supplement other eligible activities.

(f) Woody debris addition for bank stabilization.

(g) Other activities recommended by the Committee and approved by the Executive Director.

3. Wetlands -

(a) Construction of berms or other structures, plugging of dams or outlet structures, construction of diversion structures, excavation of areas, etc. to capture and store water on a site.

(b) Breaking or plugging of agricultural tiles or drains.

(c) Construction of low maintenance water control structures (inlets and outlets).

(d) Planting of wetland vegetation, nurse or cover crops, and grasses on slopes, berms, etc.

(e) Placement of wetland topsoil or hydric soil mulch.

(f) Site activities required for establishment of a wetland during the three-year establishment period (e.g., selective harvesting, cultivation, weed control, exotic species control).

(g) Construction of enclosures. (fencing, etc.)

(h) Erosion control measures (e.g., hay bales, silt fencing, etc.).

(i) Other activities recommended by the Committee and approved by the Executive Director.

B. APPROVED DESIGN STANDARDS. Project activities shall meet or exceed those standards as established under Section C of this title of the Commission's rules and regulations. Projects should be developed in consultation with a professional, such as governmental natural resources planning personnel or private consultant, who possess experience and appropriate expertise related to the type of project proposed. Structural aspects of the project must be reviewed by a professional engineer prior to the filing of an application.

C. MINIMUM STANDARDS FOR PROJECTS - GENERAL.

1. The purpose for the creation and restoration of wetlands and riparian zones is to provide the State with significant benefits in the areas of flood control, water quality enhancement, fish and wildlife

habitat, recreation, and recharging of groundwater. All construction operations of a project shall be carried out in such a manner that soil erosion and water degradation are minimized.

2. Project will involve an area large enough to maintain adequate protection and integrity of the water resource and associated bank or shoreline.

3. Project area must be identified with easily visible marking.

4. Project must comply with all applicable federal, state and local requirements including without limitation permits.

5. When practicable the proposed project must incorporate applicable Best Management Practices.

6. Proposed projects must include activities which will:

(a) contribute to the stabilization of the bank.

(b) establish a permanent vegetation covering of trees and grasses native to the area, unless otherwise approved by the Committee or Executive Director. Vegetation (e.g. trees, grasses) shall be selected that are adapted to the site based on soil and site factors.

(c) limit use of the area by people or cattle.

D. SPECIFIC STANDARDS FOR RIPARIAN ZONES.

1. Generally the minimum width desired for a zone will be thirty (30) feet, however each project will be considered on a case-by-case basis by evaluating the water flow of the stream, slope of the ground, type of vegetation and use of land adjacent to the proposed zone.

2. When feasible applicant will be encouraged to involve both sides of the stream in the proposed project.

3. The grade must be controlled, either by natural or artificial means, before any permanent type of bank protection can be considered feasible, unless the protection can be safely and economically constructed to a depth well below the anticipated lowest depth of bottom scour.

4. Stream bank protection shall be started and ended at a stabilized point on the stream provided such points exist on the taxpayers property.

5. Structural measures must be able to withstand greater floods without serious damage and should avoid an increase in erosion.

6. Vegetative protection shall be considered on the upper parts of eroding banks, including areas that are susceptible to infrequent inundation.

7. The riparian zone will be an area large enough (width and length) to maintain adequate protection and integrity of the water course and associated bank or shoreline.

E. SPECIFIC STANDARDS FOR WETLANDS.

1. The project shall be compatible with the Arkansas Wetlands Conservation Plan.
2. Restore hydrologic conditions as close to the original condition as practical.
3. Particularly in the case of created wetlands, it is recognized that all wetlands conditions may not exist within three years. However, if the Committee and the Executive Director are satisfied that processes are underway which will result in the establishment of the conditions, the project may be approved or judged complete.
4. Wetlands shall be restored adjacent to existing wetlands whenever possible to increase wetland system complexity, decrease habitat fragmentation, and enhance natural colonization of the wetland by plants and animals.
5. Wetlands shall be connected to other wetlands by corridors, where feasible, to facilitate movement of plants and animals between wetlands and to enhance other wetland functions and values.
6. All vegetation establishment components shall conform to current acceptable standards and practices to insure adequate survival rates and spacing of plantings and should be selected to benefit wildlife and not be detrimental to the environment.
7. Materials used for grade stabilization or water control structures will have a minimum ten (10) year durability in the soil, water, and climate conditions associated with the site.

SUBTITLE VI. TERMINATION OF PROJECTS.

Section 1306.1. FAILURE TO COMPLETE INSTALLATION.

A. If the Executive Director determines that failure to comply with this subsection is the result of conditions beyond the control of the taxpayer, he may extend the time for full compliance for a period not to exceed one year.

B. Under any other circumstances if the taxpayer does not complete the project within the period provided herein all credits claimed must be repaid by filing an amended income tax return within thirty (30) days for each year in which tax credits were claimed. The project will no longer be considered an authorized project for tax credit purposes and further credits will not be allowed.

C. If the taxpayer terminates the project after the completion period but prior to expiration of the minimum project life, the taxpayer shall provide written notification to the Executive Director and the Department prior to termination. In addition, the taxpayer shall file an amended tax return within thirty (30) days of termination and repay the amount of tax credit claimed which was not allowable.

D. If the Executive Director, having received no written notice of termination from the taxpayer, determines that the taxpayer has terminated the project he shall notify the Department. The Department will notify the taxpayer in writing that repayment is due, and that no further credits are allowed.

E. Sale of the real estate involved in a project shall automatically terminate the tax credit eligibility. Taxpayer should notify the Commission and the Department of the termination. The Department will then provide the taxpayer with information on the pro rata recapture of benefits due.

F. Any failure of the taxpayer to comply with the filing and required repayment of taxes will result in an assessment by the Department according to the Tax Procedures Act.

Section 1306.2. TAX CONSEQUENCES.

A. Upon termination of the project, the taxpayer shall not be allowed any further tax credits provided under the Act and the Department shall recapture the pro-rata share of any tax credits claimed under the Act for the period of termination.

B. The pro-rata share of recapture of the disallowed tax credits shall be determined by dividing the period of time from termination of the project until the expiration of the minimum life of the project by the required minimum life of the project times the tax credit claimed.

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